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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1

AMERICAN EXPORT LINES, INC.,

Petitioner,

-against-

GILBERTO ALVEZ AND JOSEPH VINAL
SHIP MAINTENANCE, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT GILBERTO ALVEZ

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BRIEF FOR RESPONDENT GILBERTO ALVEZ

Statement

While working aboard petitioner's vessel in the territorial waters of the State of New York as a lasher, Gilberto Alvez was struck in the eye by a defective tension jack. He sustained serious injuries, including the loss of his right eye and a severe depressive reaction. He sought to amend his complaint to allege a cause of action on behalf of his wife, Juanita, for loss of her husband's consortium. This motion was denied by Special Term. On appeal, the New York State Supreme Court, Appellate Division, First Department, reversed on the law and granted the motion to amend the complaint.

The New York State Court of Appeals affirmed, permitting the cause of action of Juanita Alvez to be submitted to a jury along with that of her husband.

Historical Background

The first reported case involving the question of recovery of damages for loss of consortium under the maritime law is *New York and Long Branch Steamboat Co. v. Johnson,* 195 F 740 (3rd Cir. 1912), which permitted the husband of a passenger injured on a ship to recover damages for his wife's consortium. Fifty-one years later in *Igneri v. Cie de Transports Oceaniques,* 323 F 2d 257 (2nd Cir. 1963) the same remedy was denied the wife of an injured longshoreman. There had been no intervening decision of the Supreme Court, yet certiorari was denied. (376 US 949). The *Igneri* opinion relied on a decision of this Court in *The Harrisburg,* 119 US 199.

Seven years after the decision in *Igneri,* in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), this Court broke the shackles of *The Harrisburg* by declaring that in keeping with the liberal objectives of the maritime law it did have the power to expand the rights of maritime workers and their dependents. Having recognized the dynamic, flexible quality of the maritime law in *Moragne,* four years later this Court was called upon to decide whether the remedy for maritime wrongful death should include non-pecuniary losses such as loss of companionship and consortium, in *Sea-Land Services, Inc. v. Gaudet,* 414 US 573, 94 S.Ct. 806, 39 L.Ed. 9 (1974). Petitioner in that case argued that maritime law did not allow recovery for non-pecuniary losses. The case relied on by petitioner for that proposition was *Igneri,* the same case relied on by petitioner here. *Igneri* had held that diminution of the value of the husband's society and affections were elements too intangible to be measured by a jury. This Court rejected that view, citing with approval *New*

York and Long Branch Steamboat Co. v. Johnson, supra, and *Benedict on Admiralty,* 366 (6th Edition 1940). *Igneri* was mentioned only as holding a contrary view.

At the time of the *Gaudet* decision, 27 out of 44 states which had passed on the question allowed recovery for loss of the husband's society in personal injury cases, as opposed to 12 in 1963 when *Igneri* was decided. That majority has now swelled to 37 (A12-A13, Footnote 4).*

Both *Moragne* and *Gaudet* involved deaths which occurred within the territorial waters of a state. Last year, in *Mobil Oil Corporation v. Higginbotham,* 436 US 618 (1978), this Court was confronted with the question as to whether to allow damages for loss of consortium and society where death had occurred beyond the three-mile limit. Recovery was denied on the basis that to allow such damages would run directly contrary to the Death on the High Seas Act, 46 USC 761, which allows damages only for pecuniary losses.

The *Higginbotham* opinions, both the majority one and the dissenting opinion of Justice Marshall, make it crystal clear that loss of consortium and loss of society may be recovered for when the injury occurs within the three-mile limit, and that this determination, reached in *Gaudet,* followed both "the humanitarian policy of the maritime law" and the "clear majority of states," both of which favored recovery for loss of society. *Id.* at page 622.

After the *Gaudet* decision, a California appellate court was called upon to decide whether a longshoreman's wife should be permitted to recover damages for loss of consortium of her injured husband in *Pesce v. Summa Corp.,* 54 Cal. App. 3rd 86, 926 Cal. Rptr. 451 (1975). The holding of that court succinctly stated:

*Numbers in parentheses refer to pages in Appendix to Petition.

"Since we can perceive no logical, sound or reasonable basis to differentiate between the case where the husband is killed, as opposed to injured, in respect to the wife's entitlement to recover for loss of consortium, we conclude that Igneri has been overruled by Sea-Land Services as construed by Skidmore."

The Chief Judge of the United States District Court for the Southern District of Georgia in passing on the same issue stated:

"I am unable to see the rationality of a rule that if a defendant's negligence causes death, consortium can be recovered by the widow, but where only injury results, a wife cannot. I perceive no difference in the nature of suits for wrongful death and for tortious injury justifying so bizarre and inconsistent a result. A wife may be damaged as much as a widow by the loss of her husband's society, affection, companionship and sexual congress." *Lemon v. Bank Lines, Ltd.*, 411 F.Supp. 677 (1976)

Shortly after the *Lemon* case was decided, the Court of Appeals denied the right of the wife of a Jones Act seaman to recover for loss of her husband's consortium, in *Christofferson v. Halliburton Co.*, 534 F 2d 1147 (5th Cir. 1976). Judge Lawrence interpreted this decision as requiring him to reverse his determination in *Lemon*, even though Lemon was a longshoreman.

In August of 1976, Special Term denied Alvez' motion to amend his complaint so as to add a claim by his wife for loss of consortium, relying on *Igneri.* Thereafter, judges of the district courts in New York appear to have been about equally divided as to whether *Igneri* was overruled by *Gaudet.* Compare *Giglio v. Farrell Lines, Inc.*, 424 F.Supp. 927 (SDNY 1977), appeal denied (2nd Cir., Feb. 17, 1977) with *Westcott v. McAllister Bros., Inc.*, 463 F.Supp. 1039 (1978).

REASONS FOR DENYING THE WRIT

I

THE DECISION OF THE COURT OF APPEALS FOLLOWED THE LAW AS SET FORTH BY THIS COURT IN *SEA-LAND SERVICE, INC. v. GAUDET,* 414 US 573.

This Court in *Gaudet* clearly declared that recovery could be allowed under the maritime law for loss of consortium. If petitioner is to distinguish this case from *Gaudet,* it can only be on the basis that the law should somehow be different in a death case from that in a case where the injured person survives. Such cannot be correct, for the very reason that impelled this Court to hold as it did, not only in *Gaudet,* but in *Moragne* and *Higginbotham* as well.

In *Moragne* this Court, in holding that there was a right to recover for death in a case otherwise governed by the General Maritime Law, held that the *primary* wrong giving rise to the remedies was the injury caused to the decedent. Thus, the Court stated, 398 US at pages 381-382.

"Where existing law imposes a primary duty violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be non-actionable simply because it was serious enough to cause death. On the contrary, that rule has been criticized ever since its inception, and described in such terms as 'barbarous', e.g., *Osborne v. Gillett,* 9 L.R. Exch. 88, 94 (1873) (Lord Bramwell, dissenting); Pollock, *The Law of Torts* 55 (Landon ed. 1951); 3 Holdsworth, *History of English Law,* 676, 677 (3rd ed. 1927). Because the primary duty already exists, the decision whether to allow recovery for violations causing death is entirely a remedial matter."

The Court went on to state that since the primary source was the injury to the person itself, whether the person lived or died was only a matter of remedy deriving secondarily from the primary cause. It found no difficulty in altering the remedy so as to give, by necessary logic, the same remedy that would otherwise have been given in ther event the injury were not fatal.

In *Moragne* the Court did not specify all the damages that would be recoverable by reason of the primary injury, but in *Gaudet* the Supreme Court stated specifically that included in the right of loss of society granted in a fatal case was the right to recover for the loss of consortium. Again, bearing in mind what was stated in *Moragne,* this right could only exist as the right also existed in a non-fatal case. Indeed, as pointed out above, the petitioner in *Gaudet* argued that maritime law did not allow recovery for non-pecuniary losses, relying on *Igneri.*

Curiously, petitioner's brief acknowledges the close relationship between loss of consortium in death cases and in personal injury cases (pp. 16-17) and the fact that the Second Circuit drew analogical support from the lack of such a remedy in death cases. But petitioner's argument will not withstand logical scrutiny in the face of *Gaudet.* Permitting recovery for loss of consortium where a longshoreman or harbor worker is killed while denying it when he is maimed would be utterly illogical and unjust.

POINT II

THE COURT OF APPEALS WAS NOT BOUND TO FOLLOW *IGNERI,* BECAUSE IT IS NOT CONTROLLING FEDERAL LAW TODAY.

Thirty-eight years ago this Court was called upon to decide whether or not a cause of action for maritime personal injuries survived the death of the tort feasor, where the tort occurred within the territorial waters of a state whose law permitted survival of causes of action for personal injuries. In holding that the principle of non-survival was not so strongly entrenched in the maritime law as to compel ignoring the state law, Chief Justice Hughes observed:

> " . . . With respect to maritime torts we have held that the State may modify or supplement the maritime laws by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation . . ." *Just v. Chambers,* 312 US 383, 388, 61 S.Ct. 687, 691.

Assuming arguendo that *Moragne* and *Gaudet* did not overrule *Igneri,* what did this Court have to say about the general policy of the maritime law?

> "It better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." *Sea-Land Services, Inc. v. Gaudet,* 414 US 573, 583.

Counsel for respondent and third-party defendant Vinal has suggested that the petition raises a first impression reverse *Erie R. Co. v. Tompkins,* 304 US 64 question. Under the doctrine of *Erie,* federal courts must follow the decisions of a state's highest court. In the absence of a ruling by the state's highest court, a federal court will be bound by the ruling of an

intermediate court, unless there is persuasive evidence that the state's highest court would reject that ruling. *West v. American Telephone & Telegraph Co.*, 311 US 223 (1940), 61 S.Ct. 179. The opinion of the intermediate appellate court does not necessarily represent binding authority, even though the state's highest court has denied certiorari. *Graham v. White-Phillips Co.*, 296 US 74 (1935), 56 S.Ct. 15. Difficulty in determining what the state courts may thereafter determine the state law to be do not provide a reason for the federal court to deny jurisdiction. *Meredith v. City of Winter Haven*, 320 US 228 (1943), 64 S.Ct. 7.

When a federal court must determine state law, it should not slavishly follow lower court or even upper court decisions but ought to consider all the data the highest court of the state would use. *Roginsky v. Richardson-Merrell, Inc.*, 378 F 2d 832, 851 (2nd Cir. 1967), citing Corbin, *The Laws of the Several States*, 50 Yale L.J. 762 (1941). Even a determination by the highest court of a state need not necessarily bind a federal court, where later developments make it apparent that the decision no longer represents the law of the state. *Evans v. S.J. Groves & Sons Co.*, 315 F 2d 335, 341-345 (2nd Cir. 1963).

Finding a lack of unanimity among decisions concerning the question (A11) the court below properly examined the ratio decidendi of *Igneri* to see if it was still valid today (A12). In his opinion in *Igneri*, Judge Friendly assigned three principal reasons for denying Mrs. Igneri's claim:

1. The lack of any clear common-law trend to allow such claims (323 F 2d 260-263).

2. The assertion that the damages which might be recovered are:

(a) parasitic in nature (id 263)

(b) too personal, intangible and conjectural to be measured in pecuniary terms by a jury (264).

3. The failure of the maritime law to recognize a claim for injury to the right of consortium either by the wife of a Jones Act seaman or by his widow (id 266-267).

1. The Common Law

In his opinion, written 16 years ago, Judge Friendly noted that maritime law applied, and that when there are no clear precedents in the law of the sea, that admiralty judges often look to the law prevailing on the land. He said, 323 F 2d at page 260:

> ". . . At least this much is true. If the common law recognized a wife's claim for loss of consortium, uniformly or nearly so, a United States admiralty court would approach the problem here by asking itself why it should not likewise do so; if the common law denied such a claim, uniformly or nearly so, the inquiry would be whether there was sufficient reason for an admiralty court's nevertheless recognizing one. Compare the Harrisburg, 119 US 199, 213-214, 7 S.Ct. 140, 30 L.Ed. 358 (1886). So we turn to the common law."

Seven years after these words were written, this Court in *Moragne* expressly overruled the *Harrisburg*. The underpinnings of *Igneri*, if not destroyed, were certainly badly weakened.

Judge Friendly's analysis in *Igneri* considered the fact that since a wife's right to recover for loss of her husband's consortium was first enunciated by the United States Court of Appeals for the District of Columbia in *Hitaffer v. Argonne Co.*, 183 F 2d 711, 87 US App. D.C. (1950), only 11 states[1] had followed suit, whereas 19 others[2] who had considered the question since 1950 had refused. It had been rejected by the Court of Appeals

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1. Arkansas, Delaware, Georgia, Illinois, Iowa, Michigan, Missouri, South Dakota, Montana, Nebraska and Oregon.

2. Alabama, Arizona, California, Colorado, Connecticut, Florida, Kansas, Kentucky, Maryland, New Hampshire, New Jersey, New York, Oklahoma, Pennsylvania, South Carolina, Texas, Washington, West Virginia and Wisconsin.

for the State of New York, *Kronenbitter v. Washburn Wire Co.*, 4 NY 2d 524 (19). It was not the view expressed by the *Restatement of Torts.* Finding no evidence that the common law clearly authorized a wife's recovery, he found no reason for an admiralty court's nevertheless recognizing one.

How different the situation is today. A wife's right to recover damages for tortious invasion of her consortium is now recognized by 35 of the 50 states, as well as the District of Columbia, the Virgin Islands, and the territory of Puerto Rico.[3] Only six states which have considered the issue still deny the remedy.[4]

Today the *Restatement of Torts,* Second, recognizes *Hitaffer* as the prevailing view, contrary to its position when *Igneri* was decided. See Section 693, comment d, page 496.

2. The Nature of the Damages.

In *Millington v. Southeastern Elevator Co.*, 22 NY 2d 498, 507 (19), the New York State Court of Appeals commented:

> "It is also contended that the 'sentimental' damages such as the diminution of the value of her husband's society and affection and the deprivation of sexual relations and the attendant loss of child-bearing opportunity are too personal, intangible and conjectural to be measured in pecuniary terms by a jury. This argument has no merit. The logic of it would also hold a jury incompetent to award damages for pain and suffering."

This Court, in *Sea-Land Services v. Gaudet, supra,* 414 US 573, 588-590 put to rest the argument that such damages are too speculative to be measured.

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3. The court below listed 34 states (A12-A13 Footnote 4). In addition, Hawaii, *Nishi v. Hartwell,* 473 P 2d 116 (Sup. Ct. of Hawaii 1970); Puerto Rico, Gonzales v. Fireman's Fund Ins. Co., 385 F.Supp. 140 (D.C. Puerto Rico 1974); Virgin Islands, *Hubschman v. Antilles Airboats, Inc.*, 440 F.Supp. 828 (1977).

4. Connecticut, Kansas, South Carolina, Washington, West Virginia and Louisiana.

POINT III

THE DECISION BELOW DID NOT DESTROY ANY UNIFORM PATTERN OF THE MARITIME LAW WITH RESPECT TO THE RECOVERY OF DAMAGES.

With the decision of this Court in *Higginbotham,* it has become apparent to even a casual observer that uniformity is an illusory goal where remedies for seamen and harbor workers injured or killed aboard ship is concerned. When a worker is killed beyond the three-mile limit, his survivors are restricted to pecuniary losses, but where death occurs within the territorial waters of a state the liberal doctrine of *Moragne* applies. This naturally favors the survivors of longshoremen and harbor workers, who work on the territorial waters. On the other hand, the remedy for breach of the duty to provide a seaworthy vessel extends to Jones Act seamen, but not to longshoremen and harbor workers. *Pub. L. 92-576, 86 Stat. 1251.*

More and more, attorneys representing injured longshoremen are seeking new defendants on whom to fasten blame. Where latent defects of ship's gear or even of cargo-handling equipment provided by the stevedore causes injury or death, this formerly gave rise to a remedy against the vessel. *Alaska Steamship Co. v. Petterson,* 347 US 396. Now, the only remedy for a latent defect will be a products liability claim against the manufacturer or supplier. Such a claim would be governed by state law, and, as mentioned above under Point II, the overwhelming majority of states permit recovery for loss of a husband's consortium. Claims in the same suit are often asserted against the vessel owner and against other defendants, such as manufacturers and suppliers and independent contractors. Consider the confusion in instructing a jury where different measures of damages apply against different defendants

for the same injury. Uniformity is promoted by bringing the maritime law in line with the *Restatement* and the clear majority of the states.

The case principally relied on by petitioner for the proposition that wives of Jones Act seamen cannot recover for loss of their husband's consortium is *Christofferson v. Halliburton Co.*, 534 F 2d 1145 (5th Cir. 1976), which involved injuries sustained by the husband while working as a seaman in Federal waters off the Louisiana coast. The decision was by a divided court, with a strong dissenting opinion. Rehearing was denied, with four judges dissenting, 542 F 2d 1174.

Two things in particular are interesting to note about the majority opinion in *Christofferson*. The first is that in order to deny Mrs. Christofferson a remedy for loss of her husband's consortium, the majority found it necessary to declare that no such remedy exists under the law of Louisiana, 534 F 2d at page 1151. The implication is clear that had Christofferson been injured in New York, which permits a wife to recover such damages, Mrs. Christofferson would have been allowed to maintain her action.

The second aspect of the majority opinion in *Christofferson* which is of interest is that the court mentions its prior endorsement of *Igneri* in the case of *Canal Barge Co., Inc. v. Griffith*, 480 F 2d 11 (5th Cir. 1973),[5] a case decided after *Moragne* and before *Gaudet* in which the Fifth Circuit refused to allow damages for loss of consortium in a maritime wrongful death claim. Denial was based on *Igneri*, the Court stating, 480 F 2d at page 31:

> ". . . Igneri v. Cie de Transports Oceaniques, 323 F 2d 257, established that in actions under general maritime law to recover for personal injuries caused by both negligence and unseaworthiness, the spouse may not recover for loss of consortium, which was defined as 'the mutual right of

5. 534 F 2d at page 1149.

> the marriage partners to each other's society, companionship, and affection, including sexual intercourse' . . . "

There could hardly be a clearer statement that loss of consortium of a living spouse and that of a deceased one are inextricably interwoven. Before the appellate process was exhausted in *Canal Barge*, this Court handed down its decision in *Gaudet*. On rehearing, the Fifth Circuit remanded *Canal Barge* for a rehearing for determination of damages for loss of consortium, 573 F 2d 911 (1975).

The majority in *Christofferson* not only ignored the fact that their 1973 opinion in *Canal Barge*, which had relied so strongly on *Igneri*, was overruled by *Gaudet*, they stretched logic beyond its limits in rejecting appellants' arguments that *Igneri* had been shorn of its vitality by *Gaudet* and by the dramatic change in the common law over the intervening thirteen years. They quickly forgot how strongly they had relied on *Igneri* three years earlier in denying to a widow damages for loss of consortium. Instead, they seized upon two sentences from the *Gaudet* opinion, sentences quoted at page 7 of petitioner's brief, as standing for the proposition that no right could arise for a wife to recover for loss of consortium until the injured longshoreman died.

The dissenting opinion of Judge Freeman quite accurately pointed out that the majority was reading too much into language which intended only to emphasize that the verdict which the deceased Gaudet had recovered before his death could not have encompassed those damages which were personal to the survivors. 583 F 2d at 1153-1154. The language in question, although incorporated in the *Gaudet* opinion immediately after the discussion of loss of society, probably refers more to accural of the individual items of compensable loss included within that cause of action. Moreover, the Court's discussion of "loss of society" and decisions recognizing an in-

dependent action for "loss of consortium" indicates a clear awareness that the latter cause of action, if otherwise permissible, could clearly arise during the decedent's lifetime:

> "Juries are often called upon to measure damages for pain and suffering, mental anguish in disfigurement cases, or intentional infliction of emotional harm. In fact, since the 17th century, juries have assessed damages for loss of consortium — which encompasses loss of society — in civil actions brought by husbands whose wives have been negligently injured. More recently, injuries have been asked to measure loss of consortium suffered by wives whose husbands have been negligently harmed." 414 US 589-590, 94 S.Ct. at 814.

The recovery for "loss of consortium" referred to clearly arises when husbands or wives are negligently "injured" or "harmed" and not merely when they are negligently killed.

As to the fact that 37 states[6] out of 44 who have considered the question have now declared the wife's right to recover for loss of her husband's consortium, the language quoted in defendant-appellant's brief would appear to urge that 85% does not constitute near uniformity, or, as suggested at page 267 of Judge Friendly's opinion, clear authority. One simple answer to that contention is that this Court in *Gaudet* found that 27 out of 44 states which allowed recovery for loss of society constituted a "clear majority." This Court reasoned that allowing such a recovery under the maritime law was "compelled" by the humanitarian policy of the maritime law and by the fact that a clear majority of states recognized the right. 414 US pp. 587-588.

But the majority in *Christofferson* does not seem to argue that the number of states recognizing the right constitutes less

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6. Actually 35 states, the District of Columbia, and the Virgin Islands.

than substantial uniformity. Instead, they appear to rely on the narrow claimed distinction that because the change has been accomplished in many states by statutory modification, that law is not truly the "common law." Judge Lasker addressed that contention in *Giglio,* 424 F.Supp. at page 930:

> "With due respect for the Fifth Circuit's analysis, we believe it unlikely that the Igneri court meant to examine the 'common law' in the narrow sense of judge-made law only. Indeed, in Judge Friendly's discussion of the twelve jurisdictions that recognized the right of a wife to recover for loss of consortium, he noted that one had done so by statute. 323 F2d at 260. Moreover, at its outset the opinion asserts that where clear precedents in the law of the sea are lacking, maritime law may look to the law prevailing in the land. Id. at 259. Judge-made law was not distinguished from statutory enactments and there seems little reason to apply such limitation.

Clearly, the decision of the New York State Court of Appeals does not in any way disturb any uniform pattern of remedy of the maritime law.

CONCLUSION

The petition for writ of certiorari should be denied.

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